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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 1414

JOE GOOCH and RAFAEL BUSTAMENTE, et al., *Petitioners,*

vs.

RAMSEY CLARK, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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The Petitioner, Joe Gooch, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on September 8, 1970, and the denial of a petition for rehearing *en banc,* entered on December 1, 1970.

OPINION BELOW

The opinion of the Court of Appeals and the dissenting opinion is reported at 433 Fed.2d 74 and is

attached hereto as Appendix A. The unreported District Court opinion is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 8, 1970. A timely petition for rehearing *en banc* filed on September 22, 1970 was denied on December 1, 1970. Original jurisdiction in the District Court was based upon 28 U.S.C. §1361. Supreme Court jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether 8 U.S.C. §1181(b) authorizes the Attorney General to informally admit nonresident commuter aliens into the United States solely for the purpose of employment?

STATUTORY PROVISIONS INVOLVED

8 U.S.C. §1201(c):

> "An immigrant visa shall be valid for such period, not exceeding *four months,* as shall be by regulations prescribed, . . ." (Emph. ours.)

8 U.S.C. §1181:

> "(a) Except as provided in subsection (b) of this section, no immigrant shall be admitted into the United States unless *at the time* of application for admission he (1) has *a valid, unexpired immigrant visa* . . ." (Emph. ours.)

"(b) . . . *returning resident immigrants,* defined in §1101(a)(27)(B) ['An immigrant, lawfully admitted for permanent residence, who is returning *from a temporary visit abroad;*'] who are otherwise admissible, may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, re-entry permit or other documentation."

Pre 1965 language:

8 U.S.C. §1181(b):

". . . Otherwise admissible *aliens lawfully admitted for permanent residence who depart* from the United States *temporarily* may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, re-entry permit or other documentation." (Emph. ours.)

8 U.S.C. §1101(a)(33):

"The term '*residence*' means the place of general abode; the place of general abode of a person means his principal, *actual dwelling place* in fact, without regard to intent. . ." (Emph. ours.)

8 U.S.C. §1101(a)(15):

"The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens. . ."

(H) "An alien having a *residence in a foreign country* which he has no intention of abandoning. . . (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; . . ." (Emph. ours.)

8 U.S.C. §1182(a):

"Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas *and* shall be *excluded* from admission into the United States: . . ." (Emph. ours.)

"(14) *Aliens seeking to enter* the United States, for the *purpose of performing* skilled or unskilled *labor, unless* the Secretary of Labor has determined and *certified* to the Secretary of State and to the Attorney General that (a) there are *not sufficient workers* in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (b) the employment of such aliens *will not adversely affect* the wages and working conditions of the workers in the United States similarly employed . . ." (Emph. ours.)

STATEMENT OF THE CASE

"Those who make the law must obey the law." Jean Anouilh, *Antigone.*

Petitioners, resident farmworkers, brought suit to bar the informal admission without a valid visa of 50,000 nonresident aliens who enter the United States solely to work.[1] These nonresidents, better known as

[1]Records of the Immigration & Naturalization Service of January, 1970, reflect the identification of 50,202 daily and seasonal commuter aliens from Mexico. *Migrant and Seasonal Farmworker Powerlessness,* Hearings on Border Commuter Labor Problem, Subcommittee on Migratory Labor, Senate Committee on Labor and Public Welfare, 91st Cong. 1970, Part 5A at p. 2041. (Similar earlier data is a part of the record.)

commuters, are aliens once issued a permanent residence visa, who nevertheless continued to reside in a contiguous foreign country. Although their visas expired four months after issuance,[2] commuters enter the United States daily or seasonally, to work on presentation of a form I-151 alien registration receipt card, commonly known as a 'greencard."[3]

The Immigration & Naturalization Service acknowledges that the commuter is admitted without express statutory authority. (Tr. p. 205 et seq. Depo. Gordon pp. 6-7.) The last regulation authorizing commuter entry was rescinded by the INS in 1952. (8 C.F.R. §110.6 (1949 ed.)[4] Current regulations limit the use of the greencard as a re-entry document to an alien who ". . . is returning to an unrelinquished lawful, permanent residence," consistent with the clear meaning of 8 U.S.C. §1181(b). Accordingly, the agency treats the commuter's greencard solely as a work permit issued to a nonresident alien. If the commuter ceases to be employed in the United States for a six month period, his entry privilege is deemed abandoned. *Matter of MDS*, 8 I&N Dec. 209 (1958). The service moreover refuses to permit a commuter to become a naturalized citizen unless he first establishes actual residency and remains a resident for the required five year period. *In re Correa*, 79 Fed.Supp. 265 (W.D. Tex. 1948).

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[2]8 U.S.C. §1201(c) provides that immigrant visas are valid for only four months.

[3]Studies and affidavits reveal that the commuter worker displaces resident workers from scarce jobs forcing the marginally employed to depend on public assistance. Tr. pp. 316-387.

[4]Plaintiffs in intervention emphasized that 1952 changes in the Immigration laws barred the commuter.

Until 1965 the INS attempted to justify commuter entry on the tenuous language of 8 U.S.C. §1181. Subsection (a) permits admission of a person only if he "has a valid, unexpired immigrant visa. . ." Subsection (b), however, provided that ". . . aliens lawfully admitted for permanent residence who depart from the United States temporarily" could return on presentation of informal documents. The INS reasoned that the commuter having once been accorded the "privilege of permanent residence" was still entitled to enter.

In 1965 Congress enacted broad changes in the Immigration laws replacing the national origin quota system with a Labor Department certification, subordinating alien entry to the capacity of the economy to absorb alien workers with special skills. A specific purpose of the act was to strengthen, "Safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market. . ."[5] Accordingly, Congress required that every prospective entrant obtain a certification from the Secretary of Labor that the labor supply in the United States in the field in which he would compete was inadequate and that his entry would not adversely affect the wages and working conditions of resident workers similarly employed. 8 U.S.C. §1182(a)(14).[6]

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[5]Sen. Rept. No. 748, Sept. 15, 1965 to accompany HR 2580, 1965, 2 US C&AN p. 3328, 3329.

[6]The pre 1965 section admitted immigrants *unless* the Secretary of Labor made a finding of harm. Congress' action in the interest of resident workers reflected a recurrent theme in the immigration laws, commencing in 1885 with prohibitions against the exploita-

Consistent with the intent of the Act, a 1965 Amendment to §1181(b) struck the language relied upon by the INS to admit commuters. The new language restricted informal entry to "*returning resident immigrants* defined in 8 U.S.C. §1101(a)(27)(B);" ["An immigrant, lawfully admitted for permanent residence, who is *returning from a temporary visit* abroad;"] (Emph. ours.) As residence was defined in 8 U.S.C. §1101(a)(33), specifically, "the place of general abode . . . his *principal, actual dwelling place* in fact, without regard to intent," (Emph. ours.) the clear meaning of the new language was to exclude the nonresident commuter. The commuter was not a resident returning from a visit abroad but was rather leaving his foreign home solely to work in the United States.

Had petitioner's remedy been granted by the trial court, commuter aliens would have been barred from entry until they had successfully obtained an immigrant permanent resident visa. Certainly some but not all applicants would obtain the Labor Department certification on which the visa is conditioned on grounds that resident workers were unavailable and the wages and working conditions offered in the field in which the alien was competing were sufficiently high to obviate adverse effect. El Paso garment workers commuting from adjacent Juarez, receiving

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tion of foreign contract labor. Act of Feb. 26, 1885, Ch. 164, 23 Stat. 332. The bracero, the commuter, the illegal entrant, all were found to have displaced domestic workers. Congress had let the Bracero program lapse in 1963, ending the annual importation of farm workers from Mexico which had continued since World War II. Pub. Law 78, Act of July 12, 1951, Ch. 223, 65 Stat. 119.

wages and benefits in conformity with Labor Department standards, could be certified. On the other hand, seasonal farm workers would be refused certification, since Labor Department regulations acknowledge an overabundance of resident farmworkers. (29 C.F.R. §60.2.)

The District Court, however, denied relief and instead granted defendants motion for summary judgment. The court acknowledged that farm workers had standing to challenge the government's noncompliance with statutes enacted by Congress for their benefit, and even recognized the reasonableness of plaintiff's interpretation of pertinent sections. The court nevertheless determined that the legislative history of the section was insufficient to justify the conclusion that Congress had intended the change in 8 U.S.C. §1181 (b) to bar commuters. The Court of Appeals for the Ninth Circuit affirmed the decision of the lower court, Judge Wright dissenting.

The majority opinion is based substantially on decisions of the Board of Immigration Appeals of the Justice Department, opinions which themselves contradict the plain language of 8 C.F.R. §211.1, the pertinent regulation of the Immigration & Naturalization Service. The majority opinion concludes that commuters are immigrants, ". . . admitted for permanent residence . . . having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws such status not having changed." 8 U.S.C. §1101 (a)(20). 433 F.2d at 79, Op. p. 6.

The Court reasoned that since the privilege of permanent residence had been accorded the commuter, "their disinclination to exercise that privilege is of no moment." *Ibid.* Turning to the change in 8 U.S.C. §1181(b), the Court commented, "The government's construction of the 1965 amendment strains the language severely." However, the legislative history is "virtually silent" and Congress could not have intended the change in the commuter status by such a "minor and obscure change" in the language. 433 F.2d at 80, Op. p. 8. The former Chairman of the House Subcommittee on Immigration and Nationality disagreed.[7]

The opinion fails to discuss the critical addition to 8 U.S.C. §1181(b), restricting informal entry to "returning resident immigrants." Citing the House Report, the Court notes that the intention was "to broaden the authority of the Attorney General to waive documentation required of a returning resident alien." 433 F.2d at 80, Op. p. 9. Again the restriction of that privilege to "returning resident" is unnoticed, as is the substantive significance of the change.[8]

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[7]He termed the commuter system, ". . . a creature of administrative ingenuity without a statutory base . . ." 115 Cong. Rec. pp. 7752-7753 (1967). *See also*, discussion of legislative history, ante, p. 15 et seq.

[8]The majority was unaware of, or neglected to note a 1958 Supreme Court case which determined that a resident alien who leaves the country even for a short time, "does make a new entry on his return, he is then subject, nevertheless, to all current exclusionary laws . . ." *Bonetti v. Rogers*, 356 U.S. 691, 698, 78 S.Ct. 976, 980 (1958). Judicial consideration of the commuter began in 1927 when the Supreme Court in *Karnuth v. U.S. ex Rel. Albro*, 279 U.S. 231, 49 S.Ct. 274 (1929) determined that commuters could not be admitted as nonresident alien temporary visitors for business or pleasure, since business did not include ordinary work for hire.

Finally, the Court dismisses a specific explanation of the change in §1181(b) printed in the House Committee Reports discussed in Judge Wright's dissent.

The dissent takes issue with the basis of the majority opinion; ". . . the majority, without discussion and virtually without authority, accepts the Service's contention that an alien is 'lawfully admitted for permanent residence' merely by virtue of the fact that he has at some time in the past been issued an immigrant visa. Immaterial are both an actual residence in the United States and the intention to establish one. Since I think this conclusion at war with the most elementary principles of statutory construction and unsupported by any consistent administrative interpretation, I must respectfully dissent." 433 F.2d 83, Op. p. 12. The dissenting opinion explains, ". . . the majority's construction of 'lawfully admitted for permanent residence' as including commuters makes nonsense of the Congressional policy embodied in no fewer than five sections of the Act entirely apart from Section 1101(a)(27)(B), and is contrary to the plain meaning of two others." 433 F.2d at 83, Op. p. 14. If the majority opinion is correct, ". . . all of the thousands of people, all over the world, who have ever received a valid immigration visa, also qualify as aliens lawfully admitted for permanent residence." 433 F.2d at 84, Op. p. 16. ". . . the plain meaning of the act and the intent of Congress are so clear as to foreclose judicial deference to an administrative agency. Nor have the courts deferred to any consistent or coherent interpretation of the agency," the dis-

sent reasons, referring to 8 C.F.R. §211.1(b), 433 F.2d at 87, Op. p. 20.

The distinctions between the majority and the dissenting opinions are irreconcilable. Significantly, the opinions take issue over a final decision in another circuit which had previously determined that the commuter had no right to enter the United States. *Amalgamated Meat Cutters & Butcher Workmen v. Rogers,* 186 F.Supp. 114 (DC DC 1960).

REASONS FOR GRANTING THE WRIT

1. THE DECISION IS IN CONFLICT WITH ANOTHER CIRCUIT ON THE ADMISSIBILITY OF THE COMMUTER.

Judge Youngdahl ruled in the *Amalgamated Meat Cutters* case, *supra,* that commuters were nonimmigrants as defined in 8 U.S.C. §1101(a)(15)(H)(ii) and that they therefore had no right of informal entry. The Court concluded, ". . . Mexican commuters do not reside in the United States and that it therefore is not possible for them to be aliens lawfully admitted for permanent residence." 186 F.Supp. at 118, 119. Significantly, *Amalgamated Meat Cutters, supra,* was not appealed. Rather the Justice Department avoided its consequences by limiting it to the specific fact situation discussed, a labor dispute arising at a Texas packing house. See *In re J.P.,* 9 I&N Dec. 591, 594 (1962).[9]

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[9]Other than the appeal at bar, and the historic *Karnuth* case, *supra, Amalgamated Meat Cutters, supra,* is the only substantive adjudication of the commuters' status. A subsequent challenge to the Justice Department policy, *Texas AFL-CIO v. Kennedy,* 330

The issue raised therefore by this motion for certiorari poses a square conflict between the majority opinion and the *Amalgamated Meat Cutters* case, *supra*. The *Amalgamated Meat Cutters* case, *supra,* is discussed by both the majority and the dissenting opinion. It finds, in contrast to the majority opinion, that commuters are not immigrants as defined in §1101(a)(27)(B). Similarly, in express conflict with the majority opinion, *Amalgamated Meat Cutters, supra,* finds that, as indicated, commuters are nonimmigrants as defined in 8 U.S.C. §1101(a)(15)(H)(ii). The majority opinion in its concluding paragraph indicates its agreement with the INS, ". . . that *Amalgamated Meat Cutters* was wrongly decided, . . ." and that Congress did not intend to adopt the decision in 1965. 433 F.2d at 82, Op. p. 11.

The dissenting opinion in the case at bar reaches a contrary conclusion;

> "Any lingering doubt that commuters are not lawfully admitted for permanent residence ought to have been dispelled by Congress' failure to modify §1101(a)(27)(B) in 1965. Judge Youngdahl had held five years previously, in the only decision on point, that commuters could not be considered lawfully admitted for permanent residence within the meaning of the section. *Amalgamated Meat Cutters & Butcher Workmen v.*

F.2d 217 (DC DC 1964) did not reach the merits inasmuch as the court ruled that workers lacked standing to challenge the government's policy. The latter decision has no bearing on this issue since the District Court in the case at bar, "held that the plaintiffs had standing, and the government no longer challenges this holding, relying on the authority of *Data Processing Service Organizations v. Camp* (1970), 397 U.S. 150, and *Barlow v. Collins* (1970), 397 U.S. 159." 433 F.2d at 76. Op. at p. 2.

Rogers, 186 F.Supp. 114 (D DC 1960). Congress was well aware of the decision, as the Committee hearings show. But *it,* expressed no dissatisfaction whatsoever with Judge Youngdahl's decision, and declined to amend the statutory provisions on which it was based. . . Under the circumstances, I think it must be deemed adopted."[10] 433 F.2d at 82, Op. p. 17.

The question before the Supreme Court, therefore, poses the classic conflict between circuits.

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2. THE MATTER AT BAR IS ONE OF GREAT AND CONTINUOUS PUBLIC IMPORTANCE IN ITS IMPACT ON JOBLESSNESS AND REGARDING THE SUBSERVIENCE OF PUBLIC AGENCIES TO THE MANDATE OF CONGRESS.

The refusal of the Justice Department to subject the commuter entrant to the immigration laws is of material consequence both to the nation's disadvantaged and to the taxpayers. Commuter workers displace the unskilled and semiskilled poor from tens of thousands of jobs. In some instances commuters are used to depress wages available to the lowest income strata. This past year unemployment in California reached 7% of the labor force. Unemployment among the unskilled and the minorities was much higher. In November, 1970, 50,324 California families of unem-

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[10] *In Matter of Bailey,* 11 I&N Dec. 466, 467 (1965) even the Board of Immigration Appeals acceded to the rule of *Amalgamated Meat Cutters, supra.* The Board acknowledged that Labor Department certification of adverse effect would bar a commuter but extended the commuter status to temporary workers in direct conflict with 8 U.S.C. §1101(a)(15)(H). See Footnote 4, dissenting opinion 433 F.2d at 85, Op. p. 17.

ployed wage earners were dependent on public assistance at a cost to the state and federal government of $100 million annually.[11]

But in these times of widespread disrespect for the traditional mechanisms of an ordered society, there is an equally significant issue; the subservience of those who govern as well as the governed to the laws of the land. The matter at bar poses the opportunity for the Supreme Court to reaffirm that principle.

The premise that the authority of an agency is limited by its legislative mandate is fundamental to the doctrine of separation of powers upon which the American system is based. The Supreme Court has often determined that the custom of a public agency, however long standing, is void in the face of the clear language of a statute. The rule is summarized in *Louisville and Nashville Railroad Company v. United States,* 282 U.S. 740, 759, 51 S.Ct. 297, 304 (1931),

> "Long continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter the provisions that are clear and explicit when related to the facts disclosed. The failure to enforce the law does not change it."

The majority opinion is the very antithesis of this rule, since it is based solely upon administrative determinations which are at odds with clear statutory

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[11]Public Assistance Caseloads and Expenditures, November, 1970, State of California Department of Social Welfare Research and Statistics, Dec. 22, 1970. (Similar earlier data is a part of the record, Tr. pp. 316-387.)

language and confound Congress' unambiguous statement of purpose. Like the administrative agency, the majority opinion chose to ignore specific changes in the language of the statute and specific legislative history inconsistent with the majority viewpoint.

The distortion of the language of the statute by the majority is attributed to a paucity of legislative history. The position, however, is predicated on the supposition that the language would in its effect terminate the commuter status. Both assumptions are erroneous. The legislative history is ample and the change in 8 U.S.C. §1181(b) does no more than control the commuter class by subjecting all nonresident greencard holders to periodic reapplication for a visa and the attendant Labor Department certification process.

The hearings of the House Subcommittee on Immigration which drafted the legislation demonstrate beyond doubt that Congress intended to ratify the earlier decision of Judge Youngdahl in the *Amalgamated Meat Packers* case, *supra*. At the hearing, the general counsel for the INS reiterated the basic position of the majority opinion.[12] Counsel to the Committee retorted that, "An immigrant who came here from overseas, established a residence but left his family behind and is going abroad to visit that family . . . would be, in my opinion, a returning immigrant when he comes back, regardless of how often

[12] *Hearings, Study of Population and Immigration Problems, Commuter;* Immigration Subcommittee, House Committee on the Judiciary, 88th Cong., 1st Sess. 163-69, 1963.

he makes the trip. But what is different is the commuter who has not established residence here and therefore is not returning thereto." *Id.* at pp. 168, 169. Counsel for the INS then fell back on the language of 8 U.S.C. §1181(b) which he indicated ". . . doesn't refer to a visit. It talks about departure: . . ." *Id.* at 169.

The change in the language of the section adopted in 1965 was to delete "aliens lawfully admitted who 'depart' temporarily", and restrict informal entry to "returning resident immigrants" defined in Section 1101(a)(27)(B), "returning from a temporary visit abroad." The change substantiated the House Subcommittee counsel's position, who no doubt drafted it, and removed the INS counsel's legal base.

Finally, the comments of the INS General Counsel explain the language of the House Report on the change noted by the majority opinion.[13] The report stated that §1181 is amended to "broaden the authority of the Attorney General to waive documentation required of a returning resident alien."[14] Since the INS General Counsel indicated that the statute did not previously provide that one who had a residence in the United States could come and go under that section,[15] the use of the term "returning resident im-

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[13]433 F.2d at 80, FN 21, Op. p. 9. A 1958 Supreme Court case had determined that even a returning resident was not per se admitted under the law. *Bonetti v. Rogers*, 356 U.S. 691, 698, 78 S. Ct. 976, 980 (1958), cited in *Amalgamated Meat Cutters and Butcher Workers v. Rogers*, 186 F.Supp. 114, 118 (DC DC 1960).

[14]H. R. Report No. 745, 89th Cong., 1st Sess. (1955) at 21.

[15]Hearings, Study of Population and Immigration Problems, Commuter: Immigration Subcommittee, House Committee on the Judiciary, 88th Cong., 1st Sess. at 167 (1963).

migrant" both broadened the Attorney General's authority and indicated Congressional intent to restrict informal entry to bona fide residents, excluding commuters.

From the language of the section itself confirmed by the legislative history, it is irrefutable that Congress by amending 8 U.S.C. §1181(b) and §1182(a)(14) ratified the rule of the *Amalgamated Meat Cutters* case, *supra,* subjecting commuter aliens to the Labor Department Certification process.[16]

The Supreme Court has in the past resorted to analysis of the testimony presented at Congressional committee hearings in order to interpret questionable statutory language and has resolved questions in conformity with general statements of legislative intent. *United States v. Plesha,* 352 U.S. 202, 77 S.Ct. 275 (1957). Both committee hearings and the statement of purpose support petitioner's position. However, the language is so clear that resort to these aids in interpretation are unnecessary, as the dissenting opinion indicated.

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[16]The court in *Amalgamated Meat Cutters,* 186 F.Supp. at 119, 120, ruled that "returning lawfully domiciled resident aliens" may enter the United States in spite of the Labor Department's prohibitory order but that commuters should be excluded.

CONCLUSION

"In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself." *James Madison, The Federalist,* No. 51, Feb. 6, 1788.

A Writ of Certiorari should therefore issue to review the judgment and majority opinion of the Ninth Circuit.

Dated, San Francisco, California,
February 23, 1971.

Respectfully submitted,
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(Appendices A and B Follow)

Appendix A

United States Court of Appeals for the Ninth Circuit

Joe Gooch and Rafael Bustamente, et al., Plaintiffs-Appellants, vs. Ramsey Clark, et al., Defendants-Respondents.	No. 24788
George Meany, et al., Plaintiffs in Intervention-Appellants, vs. Ramsey Clark, et al., Defendants-Respondents.	No. 24791

[Sept. 8, 1970]

Appeal From the United States District Court for the Northern District of California

Before: HAMLEY, HUFSTEDLER, and WRIGHT, Circuit Judges

HUFSTEDLER, Circuit Judge:

The central issue on appeal is this: Does the 1952 Immigration and Nationality Act, as amended in 1965, close our international borders to "alien commuters," numbering some 30,000 to 40,000 persons? An alien or "green card" commuter is an alien who has been

admitted into the United States for permanent residence, but who chooses to keep a home in Canada or Mexico and to cross daily or seasonally into this country to work. These commuters carry an alien registration receipt card (form I-151), commonly called a "green card," and use it as a border-crossing card in compliance with the documentation requirements of the Attorney General of the United States.

Suit was initiated on behalf of resident farm workers employed in southern California seeking an order directing Government officials to deny admission to alien commuters. The AFL-CIO intervened as a plaintiff, representing a broader class of residents of the United States with whom the alien commuters compete in the labor markets adjoining our international boundaries. The Government[1] successfully moved for a summary judgment from which this appeal was taken.

The district court had jurisdiction under 28 U.S.C. § 1361. Our jurisdiction rests on 28 U.S.C. § 1291. Both sets of plaintiffs base their standing upon the alleged adverse impact of alien commuters on the wage levels and working conditions of United States residents in those areas.[2] The district court held that the plaintiffs had standing, and the Government no

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[1]For convenience we use "Government" to refer to the individually named Government officials. Occasionally "Immigration Service" or "Service" is used to refer to the Immigration and Naturalization Service.

[2]*See* Note, "Aliens in the Fields: The 'Green-Card Commuter' Under the Immigration and Naturalization Laws" (1969) 21 Stan. L. Rev. 1750, 1763-68, for a discussion of studies of the commuter impact.

longer challenges this holding, relying on the authority of *Data Processing Serv. Organizations v. Camp* (1970) 397 U.S. 150 and *Barlow v. Collins* (1970) 397 U.S. 159.[3]

The Government contends that an alien commuter is within the class of persons described by 8 U.S.C. § 1101(a)(27)(B): "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad." Such a classification would entitle the Attorney General to admit commuters under the informal documentation requirements authorized by 8 U.S.C. § 1181(b) and would exempt commuters from the labor certification provisions of 8 U.S.C. § 1182(a)(14). Appellants argue that commuters are not entitled to this classification because they are (1) "nonimmigrants" rather than "immigrants," (2) not "lawfully admitted for permanent residence," and (3) not "returning from a temporary visit abroad." We discuss the issues seriatim.

I.

The Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.* ("the Act"), provides a comprehensive scheme for the admission and exclusion of aliens. It allows for the admission of aliens[4] under either "immigrant" or "nonimmigrant" status. Section 1101(a)(15) supplies a negative definition of "immigrant":

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[3]An earlier attack on the commuter practice was dismissed for lack of standing. *Texas State AFL-CIO v. Kennedy* (D.C. Cir.) 330 F.2d 217, *cert. denied* (1964) 379 U.S. 826.

[4]An "alien" is every person not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3).

> "The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens—[12 classes of nonimmigrants follow]."

In construing the 1952 Act, "we are not concerned with the ordinary definition of the word 'immigrant' as one who comes for permanent residence. The Act makes its own definition . . . . The term thus includes every alien coming to this country either to reside permanently or for temporary purposes, unless he can bring himself within one of the exceptions." *(Karnuth v. United States ex rel. Albro* (1929) 279 U.S. 231, 242-43.)[5]

Appellants argue that commuters are within an exception and are therefore nonimmigrants, citing 8 U.S.C. § 1101(a)(15)(H)(ii). That section defines one kind of nonimmigrant as:

> "(H) an alien having a residence in a foreign country which he has no intention of abandoning (i) . . . or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country. . . ."

A review of the administrative practice regarding commuters and the legislative history of the subsection convince us that Congress did not intend com-

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[5]The Supreme Court was construing the predecessor of § 1101(a)(15)—Immigration Act of 1924, Pub. L. No. 139, ch. 190, § 3, 43 Stat. 153, 154, formerly 8 U.S.C. § 203—which provided:

> "When used in this Act the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except [the enumerated classes of nonimmigrants]."

muters to fall within (H)(ii); indeed, they are disqualified by the very language of the subsection.

Prior to the enactment of the 1952 Act, the administrative construction was uniform: Commuters were not nonimmigrants.[6] That practice was well known to Congress when it was drafting the 1952 Act.[7] There is no indication that subsection (H)(ii) was added to the 1952 Act for the purpose of changing the Service's handling of commuters. On the contrary, the legislative history demonstrates that the subsection was addressed to a wholly different matter: During and immediately following World War II, Congress passed a series of measures authorizing the temporary admission of agricultural workers in order to alleviate domestic labor shortages.[8] After reviewing these measures, a 1950 Senate study group recommended "that provision should be made in permanent legislation which would permit the admission of temporary agricultural labor in a nonimmigrant classification when like labor cannot be found in this country."[9] Subsection (H) of the 1952 Act was an expanded im-

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[6]This Immigration Service practice was established in 1927. *See generally* In the Matter of L - - - (Central Office 1951) 4 I. & N. Dec. 454; Note, *supra*, 21 Stan. L. Rev. at 1751-55; 8 C.F.R. § 110.6 (1947 supp.).

[7]"[Nonresident alien border-crossing cards] will not be issued to aliens who . . . have been admitted into the United States for permanent residence. Aliens in the last category who cross the borders frequently are known as commuters and are not nonimmigrants . . ." Senate Comm. on the Judiciary, *The Immigration and Naturalization Systems of the United States*, S. Rep. No. 1515, 81st Cong., 2d Sess. (1950) 616; *see also id.* at 535-37.

[8]*See* Act. of Feb. 14, 1944, Pub. L. No. 229, ch. 16, 58 Stat. 11, 15-16, extended several times until 1948. *See also* Act of July 12, 1951, Pub. L. No. 78, ch. 223, 65 Stat. 119, extended several times through December 31, 1964.

[9]S. Rep. No. 1515, *supra* note 7, at 586.

plementation of this recommendation.[10] Its purpose was not to affect commuters; it was designed to permit admission of a *new* group of aliens under restrictive circumstances.[11]

To construe subsection (H) as appellants urge would render inexplicable the further requirements in (H)(ii) that "unemployed persons capable of performing such service or labor, cannot be found in this country." This phrase is part of the *definition* of aliens falling within the (H)(ii) class of nonimmigrants. Unemployed persons can be found to perform the work now done by commuters; appellants have based their standing on that fact. Thus, the same section would classify commuters as nonimmigrants and simultaneously declassify them—a nonsense reading of the section. Subsection (H)(ii), read in the context of (H)(i) and (H)(iii), was intended to confer nonimmigrant status on certain aliens who were needed in the American labor force but who, unlike commuters, would be unable to achieve admittance under immigrant status.[12]

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[10]These provisions of the bill grant the Attorney General sufficient authority to admit temporarily certain alien workers, industrial, agricultural, or otherwise, for the purpose of alleviating labor shortages as they exist or may develop in certain areas or certain branches of American productive enterprises, particularly in periods of intensified production." H.R. Rep. No. 1365, 82nd Cong., 2nd Sess., 1952 U.S. Code Cong. & Ad. News 1653, 1698.

[11]*See* 8 U.S.C. § 1184(c); 8 C.F.R. § 214.2(h)(2)(ii); C.F.R. § 602.10.

[12]*Cf. Hess v. Esperdy* (S.D.N.Y. 1964) 234 F. Supp. 909, 912. Commuters are in the unusual position of preferring immigrant to nonimmigrant status. Most aliens classified in the residual category of immigrants cannot achieve admittance to the United States because of severe numerical limitations for that category; they therefore seek admittance as nonimmigrants, for which there are no

We conclude that commuters are not nonimmigrants under section 1101(a)(15)(H)(ii). *(In the Matter of H— O—* (Bd. Imm. App. 1954) 5 I.&N. Dec. 716; *see also* C. Gordon & H. Rosenfield, *Immigration Law and Procedure* (rev. ed. 1969) 2-71 to 2-75, 6-57 to 6-58.)[13] Nor are commuters visiting the United States "temporarily for business" under nonimmigrant category (B) of section 1101(a)(15). *(See Karnuth v. United States ex rel. Albro, supra.)*[14] None of the other nonimmigrant categories being applicable, we conclude that commuters are "immigrants."

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numerical limitations. By adding the (H)(ii) category of nonimmigrants, Congress thus made possible the admittance of a new group of aliens. Every alien is presumed to be an immigrant until he satisfactorily shows that he is a nonimmigrant. 8 U.S.C. § 1184(b). But because commuters are not subject to the standard numerical limitations for immigrants (*see* 8 U.S.C. § 1101(a)(27)(B), immigrant status is preferred; they need not meet the "qualitative" requirements of the various nonimmigrant categories.

[13]Congress recently amended parts (i) and (iii) of § 1101(a)(15)(H). Act of Apr. 7, 1970, Pub. L. No. 91-225, 84 Stat. 116. The legislative history of the amendment makes no reference to commuters.

[14]We hesitate only momentarily in citing *Karnuth* for this proposition. *Karnuth* was brought by European nationals who were residing in Canada and seeking to commute to the United States. Being subject to the immigrant quotas for their home countries, they attempted to acquire nonimmigrant status under § 3(2) of the 1924 Act, the predecessor to 8 U.S.C. § 1101(a)(15)(B). The Supreme Court upheld the Service's ruling that these commuters were immigrants and therefore subject to the quotas. In so holding, the Court relied heavily on congressional intent to restrict immigration and to protect American labor.

Most aliens who acquired commuter status after *Karnuth* were Mexican and Canadian nationals and thus not subject to immigration quotas. § 4(c) of the 1924 Act; 8 U.S.C. § 1101(a)(27)(A). But the 1965 amendments to the Immigration and Nationality Act have now restricted the numbers of Western Hemisphere aliens who can achieve initial admittance under immigrant status. *See* Act of Oct. 3, 1965, Pub. L. No. 89-236, § 21(e), 79 Stat. 921, and discussion *infra* of 8 U.S.C. § 1182(a)(14). Under these circumstances, we read *Karnuth* as an authoritative interpretation of § 1101(a)(15)(B).

II.

Are commuters "lawfully admitted for permanent residence"? The phrase is itself a term of art,[15] defined in the Act as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." (8 U.S.C. § 1101(a)(20).) We agree with the Government that the definition refers not to the actuality of one's residence but to one's *status* under the immigration laws.[16] Commuters have been accorded the privilege of residing permanently in the United States, for each of them at one time received a valid immigration visa. Their disinclination to exercise that privilege is of no moment.

Appellants argue that most commuters would no longer qualify for immigration visas if they applied anew, and thus their status under the immigration laws has changed, disqualifying them under the phrase from section 1101(a)(20), "such status not having changed." That quoted phrase refers primarily to aliens who have changed their status from

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[15]"Section [1101(a)(20)] defines precisely the term 'lawfully admitted for permanent residence.' This term has especial significance because of its application to numerous provisions of the bill." H.R. Rep. No. 1365, *supra* note 10, at 1684.

[16]Even before the 1952 Act, the Immigration Service took the position that whether a commuter was "lawfully admitted" to the United States was a question of status. Matter of F - - - (Bd. Imm. App. Dec. 30, 1946) A-6300563, *cited in* Editor's Note, 3 I. & N. Dec. 526. Adoption of 8 U.S.C. § 1101(a)(20) can thus be seen as an approval of the Service's position. *See* In the Matter of H - - - O - - - (Bd. Imm. App. 1954) 5 I. N. Dec. 716. Congress was also aware in 1952 that the Service considered commuters "admitted into the United States for permanent residence." *See* note 7 *supra*.

immigrants to nonimmigrants. *(Matter of M— P—* (Bd. Imm. App. 1962) 9 I. & N. Dec. 747; *In the Matter of S—* (Bd. Imm. App. 1954) 6 I. & N. Dec. 392, *approved* (Attorney General 1955) 6 I. & N. Dec. 397.) It has little meaning in the context of section 1101(a)(27)(B), referring to *immigrants* lawfully admitted for permanent residence. But section 1101 (a)(20) is definitional, having application to a great many parts of the Act, and we should not be disturbed that the phrase "such status not having changed" appears meaningless in one particular usage. Other sections of the Act refer to *aliens* lawfully admitted for permanent residence *(e.g.,* U.S.C. § 1182(c)), and in that context the phrase is meaningful. We think the Government is right that commuters are "lawfully admitted for permanent residence."

III.

The final requirement of section 1101(a)(27)(B), necessary to allow using informal documentation under section 1181(a),[17] is that the immigrant be "re-

[17]Actually, § 1181(b) provides for waiver for such immigrants "in such cases or in such classes of cases and under such conditions as may be by regulations prescribed . . ." *Cf. Tejeda v. Immigration & Naturalization Service* (9th Cir. 1965) 346 F.2d 389, 391 n.1. But there has been no published regulation dealing with commuters since 1952. 8 C.F.R. § 211.1(b)(1), dealing with the use of form I-151, does not include commuters within its scope except for, the Government argues, the last sentence thereof.

The nonexistence of a regulation is not fatal to the Government's case. The practice of admitting commuters is long standing, was the topic of numerous regulations in the past (*e.g.,* 8 C.F.R. § 166.1 (1944 Supp.)), and has been continuously recognized in administrative decisions. We are not dealing with an ad hoc admission practice, unknown to Congress or uncontrolled by the Service. The Board of Immigration Appeals has established, by administrative case law, clear rules as to who is entitled to commuter status

turning from a temporary visit abroad." The Government argues that a commuter's nightly or seasonal departure from the United States to his foreign residence is a "temporary visit" from which he "returns" when he reenters the United States for employment.

Section 1181(b) was amended in 1965. The 1952 version did not refer to section 1101(a)(27)(B), but supplied its own definition of those persons exempted from formal documentation requirements: "otherwise admissible aliens lawfully admitted for permanent residence who depart from the United States temporarily."[18] The 1965 amendment thus had the effect of replacing the phrase "depart[ing] from the United States temporarily" "with returning from a temporary visit abroad," the language used in sectin 1101 (a)(27)(B). Appellants argue that Congress intended by this amendment to terminate admission of commuters, because one cannot say that an alien is "returning from a temporary visit abroad" when he is, in fact, leaving home to go to work.[19]

The Government's construction of the 1965 amendment strains the language severely. But that strain

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and how that status can be lost. *E.g.*, Matter of M - - - D - - - S - - - & L - - - G - - - & W - - - D - - - C - - - (Bd. Imm. App. 1958) 8 I. & N. Dec. 209. At least in this context, we read the regulation requirement of § 1181(b) to be permissive.

[18]Immigration and Nationality Act. Pub. L. No. 414, ch. 477, § 211(b), 66 Stat. 181. The language resembled that of its predecessor section in the 1924 Act, § 13(b), formerly 8 U.S.C. § 213(b): "immigrants who have been legally admitted to the United States and who depart therefrom temporarily." The 1965 amendment was Act of Oct. 3, 1965, Pub. L. No. 89-236, § 9, 79 Stat. 917.

[19]But even the old § 1181(b) has been viewed as asking whether an immigrant was returning from a "temporary visit abroad." *Barrese v. Ryan* (D. Conn. 1962) 203 F. Supp. 880, 888.

is not as intolerable as is appellants' reading of the amendment. Appellants ask us to conclude from a minor and obscure change in the language of section 1181(b) that Congress intended to end a well-known practice of the Service of more than 38 years, thereby grossly affecting some 40,000 commuters, their families, and their employers.

The legislative history is virtually silent—an eloquent silence, in view of the national and international implications that all parties agree would follow from a termination of commuting. That silence is broken only by an obscure colloquy that took place two years before section 1181(b) was amended, during a hearing before the House Judiciary Subcommittee. The exchange was between General Counsel for the Service and a legislative assistant to the Committee who agreed that departure from the United States temporarily was a better description of a commuter's travels than "returning from a temporary visit abroad."[20] The hearings resulted in no Committee recommendation against the commuter program and there is no hint that anyone outside the hearing room knew of the exchange until appellants' counsel unearthed it. Commuters are mentioned nowhere else in the massive legislative history of the 1965 changes.[21]

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[20]House Comm. on the Judiciary, Subcomm. No. 1, *Study of Population and Immigration Problems, Administrative Presentations (III), Admission of Aliens Into the United States for Temporary Employment and "Commuter Workers"* (Comm. Print 1963) 161-69 (Hearings of June 24, 1963).

[21]The statement in the Senate report relied upon by appellants refers to the revision of § 1181(a), rather than 1181(b). S. Rep. No. 748, 89th Cong., 1st Sess., 1965 U.S. Code Cong. & Ad. News 3328, 3342. The House report states, without explanation, that

For many years before 1965, the Immigration Service had taken the position that commuters were "returning from a temporary visit abroad" as used in section 1101(a)(27)(B).[22] The drafters of the 1965 amendment might well have had this in mind. The commuter practice has lasted for 43 years with Congress' knowledge and acquiescence. Congress is still aware of the commuter practice, and the problems it entails: There are several pending bills before Congress directed particularly toward commuters. *(See* Note, *supra,* 21 Stan. L. Rev. at 1768-74.) Under these circumstances, we do not accept appellants' contention that Congress intended to close our borders to commuters when it enacted a technical revision of section 1181(b).

IV.

Prior to the 1965 amendments to the Act, 8 U.S.C. § 1182(a)(14) required the exclusion of aliens "seeking to enter the United States for the purpose of performing skilled or unskilled labor" if the Secretary

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§ 1181 is amended "to *broaden* the authority of the Attorney General to waive documentation required of a returning resident alien." H.R. Rep. No. 745, 89th Cong., 1st Sess. (1965) 21 (emphasis added).

[22] *See* discussion *infra* of *Amalgamated Meat Cutters & Butcher Workmen v. Rogers* (D.D.C. 1960) 186 F. Supp. 114. And the Service thought commuters admissible under regulations to the 1924 Act as § 4(b) nonquota immigrants: "an immigrant previously lawfully admitted to the United States, *who is returning from a temporary visit abroad." See* In the Matter of D - - - C - - - (Central Office & Bd. Imm. App. 1949) 3 I. & N. Dec. 519; Note, *supra,* 21 Stan. L. Rev. at 1754. As such, they were admissible with alternative documentation: a border-crossing identification card. *See* 8 C.F.R. §§ 110.37, 110.56 (1941 Supp.) These cards were not recognized by Congress until 1940. Alien Registration Act of 1940, Pub. L. No. 670, ch. 439, § 30, 54 Stat. 670, 673.

of Labor certified that United States residents were available to undertake such labor and that the employment of aliens would adversely affect the wages and working conditions of those United States residents.[23] The 1965 amendments tightened section 1182 (a)(14) by requiring exclusion *unless* the Secretary of Labor certified that admission *would not* have these adverse consequences.[24] But both the old and new versions of the section apply only to certain enumerated classes of aliens, and aliens falling within section 1101(a)(27)(B) are not among them. At the time of a commuter's initial entrance into the United States, he would have to comply with section 1182(a)(14). But once such a lawful admittance occurred, the commuter could thereafter make regular entrances into the United States as an immigrant "lawfully admitted for permanent residence, who is returning from a temporary visit abroad."[25]

It was in this connection that the Immigration Service, even prior to the 1965 amendments to section 1181(b), argued that commuters were "returning from a temporary visit abroad" and thus fell within section 1101(a)(27)(B). In *Amalgamated Meat Cutters & Butcher Workmen v. Rogers* (D.D.C. 1960) 186 F. Supp. 114, the Secretary of Labor had certified that the admission of aliens to work in a particular

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[23]Immigration and Nationality Act, Pub. L. No. 414, ch. 477, § 212(a)(14), 66 Stat. 183.

[24]Act. of Oct. 3, 1965, Pub. L. No. 89-236, § 10, 79 Stat. 917.

[25]According to the record of the case before us, no certifications beneficial to commuters have been issued since the 1965 amendments. Consequently, we are concerned exclusively with immigrants who attained lawful admittance prior to 1965.

plant in El Paso Texas, would create the adverse conditions described in section 1182(a)(14). The Service nevertheless declined to exclude commuters bound for the plant, considering them unaffected by the certification. The union then brought suit to require the commuter's exclusion. While the district court agreed with the Service that the order was not applicable against section 1101(a)(27)(B) immigrants, it held that commuters were not within this class. The case, quickly became moot, and no appeal was taken. Nevertheless, the Service disagreed with the result reached, declined to follow it, and made clear to Congress its opposition to the decision.[26] The opinion has also been criticized elsewhere. (Note, *supra,* 21 Stan. L. Rev. at 1755-57.) We agree that *Amalgamated Meat Cutters* was wrongly decided, and can find no evidence that Congress intended to adopt the decision in its 1965 amendments to the Act. Section 1182(a)(14) cannot now be read, therefore, to bar the admission of commuters.

The judgment is **AFFIRMED.**

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[26]Staff of House Comm. on the Judiciary, *Immigration and Nationality Act With Amendments and Notes on Related Laws* (Comm. Print 4th ed. (1964) 210; House Comm. on the Judiciary, Subcomm. No. 1, *Study of Population and Immigration Problems, Judicial Decisions Construing Certain Provisions of the Immigration and Nationality Act* (Comm. Print 1963) 14; *see* House Comm. on the Judiciary, *supra* note 20, at 163-64. No final order was issued in the case because of mootness. In Matter of J - - - P - - - (1962) 9 I. & N. Dec. 591, the Board of Immigration Appeals gave limited enforcement to the decision.

Amalgamated was decided, not on the ground that commuters were not "returning from a temporary visit abroad" but on the ground that they were not lawfully admitted for permanent residence. Our disagreement with this conclusion is explained *supra.*

WRIGHT, Circuit Judge, dissenting:

The Immigration and Nationality Act requires generally that all immigrants entering the United States possess a valid, unexpired visa. 8 U.S.C. § 1181 (a). To this rule only one exception is made. § 1181 (b). It allows "returning resident immigrants, defined in section 1101 (a) (27) (b)" to be readmitted to the United States without a visa. Within § 1101(a) (27) (B) fall immigrants "lawfully admitted for permanent residence who [are] returning from a temporary visit abroad."

These provisions, as the Service concedes, were designed primarily to assist aliens actually resident in the United States, who are eligible for citizenship, are treated for most purposes like citizens, and whose re-entry Congress had every reason to facilitate. The question in this case is the very narrow one whether the benefits Congress indubitably granted to aliens actually resident here extend also to commuters, who by definition neither reside here nor intend to do so, and who are ineligible to citizenship. *Petition of Correa,* 79 F.Supp. 265 (W.D. Tex. 1948).

Is the commuter "lawfully admitted for permanent residence" within the meaning of § 1101(a)(27)(B)? If he is, then when he returns to the United States from a visit home,[1] the Service may admit him pursu-

[1] I agree with the majority that it does not impose an undue strain upon the statutory language to hold that a commuter's nightly trips home from his job are "temporary visits abroad." *See* Part III of the majority opinion.

ant to § 1181(b) without a valid visa.[2] But if he is not, then the Government concedes that there is no authority in the immigration statutes for such informal admission, and the petitioners are entitled to an order compelling the Service to obey the law.

The crux of the majority's opinion in this case is thus the first paragraph of Part II, where the majority, without discussion and virtually without authority, accepts the Service's contention that an alien is "lawfully admitted for permanent residence" merely by virtue of the fact that he has at some time in the past been issued an immigrant visa. Immaterial

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[2]The majority does not fully explain the importance to petitioners of their contention that any alien entering the United States must possess a valid visa. According to an I. & N.S. survey, most commuters who enter the United States are farmworkers, general laborers, or domestics, all of whom are in competition with petitioners. *See* 115 Cong. Rec. 7737-38 (1969). At the present time the Secretary of Labor will not certify that such workers are in short supply in the United States, or that the admission of aliens for such purposes will not adversely affect wages and working conditions here. 29 C.F.R. § 60(a)(2) (1970). Hence under § 1182(a)(14) of the Act, such aliens are ineligible for visas as special immigrants. Unless they can enter without a visa as commuters, therefore, they cannot enter the United States at all. (Skilled workers, whose trades are in short supply in this country, have no difficulty obtaining visas as special immigrants; elimination of the commuter status would make no difference to them.)

Petitioners argue, with considerable justice, that the Service's commuter practice constitutes an enormous and unjustifiable loophole in the certification procedure, and makes a shambles of the strong congressional policy of protecting American labor from low-wage foreign competition. They cite statistics showing that wage rates paid to commuters are consistently lower than the rates paid United States residents for the same work. *See* 115 Cong. Rec. 7738 (1969). Petitioners suggest that even if, strictly as a matter of statutory construction, the language of the Act can be held to support the Service's commuter practice, the longstanding congressional policy requires that this court read the Act so as to protect working people who live here. Since in my view the language of the Act cannot possibly be read to support the Service's contention, I have no occasion to reach these questions of policy.

are both an actual residence in the United States and the intention to establish one. Since I think this conclusion at war with the most elementary principles of statutory construction and unsupported by any consistent administrative interpretation, I must respectfully dissent.[3]

I.

As the majority points out, "lawfully admitted for permanent residence" is a term of art, one that appears in many sections of the Act besides § 1101(a)(27)(B). The authors of the Act took the trouble

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[3]Since I believe commuters are not "lawfully admitted for permanent residence," I have no need to decide whether they are immigrants, as the Service contends, or non-immigrants as petitioners urge. Resolution of the question is not of great practical importance. If commuters are nonimmigrants, then they may enter only if "unemployed persons capable of performing such service or labor cannot be found in this country. § 1101(a)(15)(H)(ii). If commuters are immigrants, then unless they are lawfully admitted for permanent residence they are special immigrants who may not enter without certification by the Secretary of Labor as discussed in footnote 2, *supra*. In neither case would the farmworkers, laborers, or domestics whose entry worries petitioners be admissible.

I note, however, the following difficulties in the argument advanced by the majority for accepting the Service's view:

(a) The Act makes its own definition of non-immigrants, as it does of immigrants. If commuters fit within the definition of non-immigrants, as they appear to do, then they should be held to be such. It is not a sufficient answer to petitioners' contention to say that commuters *a priori* are not non-immigrants, and that the definition could hence not have been meant to include them.

(b) If the only purpose of § 1101(a)(15)(H)(ii) was to codify the bracero program, why did Congress continue to re-enact that program specially for a dozen years after 1952?

(c) The petitioners do not suggest that § 1101(a)(15)(H)(ii) exactly describes the current commuter practice. They argue that Congress intended commuters to be within § 1101(a)(15)(H)(ii) and imposed an additional restriction for the protection of American workers. Agreeing with the majority that law and current practice are different, they argue that the Service is breaking the law.

carefully to define the term, § 1101(a)(20), and stated that a precise definition was necessary since "this term has especial significance because of its application to numerous provisions of the bill." H.R. Rep. No. 1365, 82d Cong., 2d Sess., 1952 U.S. Cong. & Adm. News 1653, 1698. Congress could not have made clearer its intention that the term be given a uniform significance throughout the Act. We are thus not at liberty to adopt one meaning of "lawfully admitted for permanent residence" in § 1101(a)(27)(B) and another in the other sections where the phrase appears: if commuters are lawfully admitted for permanent residence for purposes of § 1101(a)(27)(B), then they must be lawfully admitted for permanent residence for purposes of all other sections of the Act.

But, as I hope to show below, the majority's construction of "lawfully admitted for permanent residence" as including commuters makes nonsense of the congressional policy embodied in no fewer than five sections of the Act entirely apart from § 1101(a)(27)(B), and is contrary to the plain meaning of two others. I conclude, simply on the basis of the language of the Act, that Congress cannot have thought commuters were "lawfully admitted for permanent residence."

Take first § 1182(h) and § 1182(i). These sections provide for waiver by the Attorney General, under certain circumstances, of the ban against entry of aliens who have been convicted of a crime or who have procured entry documents by fraud. In both cases the Attorney General may grant waiver only if the alien

is the spouse, child, or parent of "a United States citizen or of an alien lawfully admitted for permanent residence." If an alien lawfully admitted for permanent residence is taken to be one who actually resides or actually intends to reside in the United States, then the sections embody a humanitarian, family-maintaining policy for residents of the United States. But I can think of no reason why Congress would choose to extend favored treatment, for example, to a Mexican convicted of a crime, simply because he was the parent of a commuter resident in Tijuana.

Or take § 1182(a)(14). Read together with § 1101(a)(27)(A), the effect is to provide that a Mexican laborer seeking to enter the United States as a special immigrant (*not* as a commuter) must receive Labor Department certification unless he is the parent, child, or spouse of a United States citizen or of an alien lawfully admitted for permanent residence. Once again, this is a sensible and humanitarian policy if the laborer's relatives actually reside in the United States. But why would Congress want to allow a Mexican laborer into the country as a special immigrant without certification, simply because his son is a commuter—by definition a resident of Mexico?

There are similar examples in other contexts. Thus § 1153(a)(2) awards second preference visas to the spouse, unmarried son or unmarried daughter of an alien lawfully admitted for permanent residence. No doubt few visas would be awarded to commuter families under this provision, since immigrants born in the Western Hemisphere are exempt from the numerical

limitations on entry. § 1153(a). But it remains hard to see why Congress would want to give special preference to the children born abroad of parents who emigrate to Canada or Mexico and become commuters.

Finally, § 1251(f) forbids the deportation of an alien who procured entry by fraud, if he is the spouse, parent, or child of a citizen or of an alien lawfully admitted for permanent residence. Would this court really construe § 1251(f) as forbidding the deportation of a Mexican who had procured entry by fraud, simply because he had a son who was a commuter resident in Tijuana? I cannot believe we would, but if the majority opinion is correct we would be obliged to.

So far I have discussed only the untoward consequences for other sections of the Act that flow from the majority's actual holding in this case—that commuters are lawfully admitted for permanent residence. The reasoning of the majority, however, leads to consequences still more absurd than the actual holding.

The majority argues that commuters are lawfully admitted for permanent residence simply because "each of them at one time received a valid immigration visa." If this is correct, it follows that all of the thousands of people, all over the world, who have ever received a valid immigration visa, also qualify as aliens lawfully admitted for permanent residence. Such aliens would not of course be commuters, since never having come to this country they could not be said to be "returning from a temporary visit abroad" and would be ineligible to use Form I-151 as an entry

document. But since according to the majority they were lawfully admitted for permanent residence, they are entitled to the benefits which that status confers.

Thus their relatives who have been convicted of crimes are entitled to specially favorable treatment. § 1182(h). Their relatives who enter this country by fraudulent means may not be deported. § 1251(f). If they were born in the Western Hemisphere, their relatives may enter as special immigrants without certification by the Secretary of Labor. § 1182(a)(14). Most startling of all, the unmarried sons and daughters of such aliens are entitled to second preference visas even though the alien himself might have been eligible for no preference whatsoever. And all these consequences follow even if the alien "lawfully admitted" never leaves his homeland. If Congress intended such a result, it chose an odd way of saying so.

Two other sections of the Act also suggest strongly that the majority is incorrect in making "lawfully admitted for permanent residence" turn solely on the fact that an immigration visa was issued, without regard to the residence or intended residence of the alien. The first is § 1182(g). That section grants privileges to the parent or unmarried son or daughter of "a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa." If the majority position is correct, then the entire last phrase is surplusage, since any alien who has been issued an immigrant visa is an alien lawfully admitted for permanent residence. Congress, however, seems to have thought the categories distinct.

Second is the definition of the border-crossing card in § 1101(a)(6). The statute there distinguishes between an "alien lawfully admitted for permanent residence" and an "alien resident in foreign contiguous territory." If one accepts the Service's construction of "lawfully admitted for permanent residence," I suppose that it is possible to give some meaning to the second phrase by construing it as applicable to non-immigrants. But the question before us is precisely *whether* the Government's construction of the statute is correct. And, approaching § 1101(a)(6) with an open mind, it would certainly appear that the plain meaning of the words indicates that an "alien lawfully admitted for permanent residence" is *not* an "alien resident in foreign contiguous territory."

II.

Any lingering doubt that commuters are not lawfully admitted for permanent residence ought to have been dispelled by Congress's failure to modify § 1101(a)(27)(B) in 1965. Judge Youngdahl had held five years previously, in the only decision on point, that commuters could not be considered lawfully admitted for permanent residence within the meaning of the section. *Amalgamated Meat Cutters & Butcher Workmen v. Rogers*, 186 F. Supp. 114 (D.D.C. 1960). Congress was well aware of the decision, as the committee hearings show. But *it* expressed no dissatisfaction whatsoever with Judge Youngdahl's decision, and declined to amend the statutory provisions on which it was based. The majority makes much of the silence of Congress as evincing an intention not to change the

law. But, whatever the case in regard to other matters, the law left unchanged as to § 1107(a)(27)(B) was Judge Youngdahl's decision. Under the circumstances, I think it must be deemed adopted.[4]

The conclusion derives support from the 1965 change in wording of § 1181(b). Until 1965, the section provided informal documentation requirements for aliens "lawfully admitted for permanent residence" returning to the United States from abroad. Congress changed the language to refer to "returning resident immigrants, as defined in § 1101(a)(27)(B)." Assuming that the majority is correct and that no change in the substantive law was intended, the new language indicates Congress's belief that those who were "lawfully admitted for permanent residence" could properly be described as "resident immigrants." Such a belief is perfectly compatible with Judge Youngdahl's view. But it is hard indeed to square with the Service's position that residence in the

[4]Nor is it possible, as the majority suggests in another context, to construe Congress's silence in 1965 as endorsement of the Service's disapproval of Judge Youngdahl's decision. True it is that the Service thought *Amalgamated Meat Cutters* wrongly decided and told Congress so. But at the very same time the Service was in administrative proceedings following the decision it disliked. In *Matter of Bailey*, 11 I. & N. Dec. 466, 467 (1965), the Board of Immigration Appeals agreed with Judge Youngdahl that a commuter was not to be admitted to the United States in the face of an adverse certification by the Secretary of Labor—a view incompatible with the Service's current position that a commuter is an 1101(a)(27)(B) immigrant to whom the certification procedure does not apply. In revising the Secretary of Labor's powers so as to make certification a prerequisite to entry rather than a ground for exclusion, Congress no doubt expected that the Service would continue to follow Judge Youngdahl's decision in *Amalgamated Meat Cutters* and its own decision in *Bailey*, and hold that a commuter could not enter unless the Secretary had made the appropriate certification. Specific amendment of § 1101(a)(27)(B) was thus unnecessary.

United States is irrelevant in determining whether an alien is lawfully admitted for permanent residence.

III.

Nor can I agree with the majority that the definition of lawfully admitted for permanent residence contained in § 1101(a)(20) requires us to adopt the Service's construction here. As the Government's brief points out, the statutory definition comes ultimately from *United States ex rel. Georgas v. Day,* 43 F.2d 917, 918-19 (2d Cir. 1930), and *United States ex rel. Stapf v. Corsi,* 287 U.S. 129, 133 (1932), cases involving a very different problem.

In those cases an alien who had improperly gained admission to the United States stayed in this country for three years, until the statute of limitations had run and he could no longer be deported. He then went abroad, and upon his return to the United States the Service attempted to exclude him. He contended that since before leaving the United States he had been a legal resident (in the sense of being non-deportable), he was entitled to re-enter as an "immigrant previously lawfully admitted to the United States returning from a temporary visit abroad," as the statute then read.

The courts in both *Georgas* and *Stapf* rejected the alien's contentions. They drew a distinction between aliens who, for whatever reasons, were non-deportable and those who, by virtue of a lawful admission in the past, occupied the status of being lawfully admitted for permanent residence. Only the latter type of lawfully resident alien was entitled to re-enter the United

States upon returning from abroad. The history § 1101(a)(20) thus shows that the language was adopted simply to reject for the future the contentions that Georgas and Stapf had made. And in neither of those cases was there the remotest suggestion that the courts endorsed the doctrine now espoused by the Service, or considered actual residence in the United States irrelevant to the status of having been lawfully admitted. Both Georgas and Stapf were unmistakably residents of the United States at the time they went abroad.

The majority also rely on evidence that Congress in 1952 knew that the Service considered commuters aliens lawfully admitted for permanent residence. But of course the question for us is whether Congress, knowing the Service's practice, adopted it—whether, in other words, the definition of "lawfully admitted for permanent residence" in the statute is the same as the one used by the Service before 1952. The best guide to what Congress intends, of course, is what it says, and for the reasons given in Part I, I cannot agree that the language of the Act is compatible with the Service's interpretation.

Finally, I doubt that in the circumstances of this case any firm conclusions can be drawn from Congress's failure to curtail the Service's commuter practice. Prior to the change in the Secretary of Labor's certification procedure in 1965, it mattered very little whether an alien was admitted as a special immigrant under § 1101(a)(27)(A) or as a commuter under § 1101(a)(27)(B). No quota or other restrictions faced either class of entering aliens. Only if the

Secretary of Labor made a certification—a fairly rare event—did the commuter even arguably have any advantages over the special immigrant. Even this advantage, moreover, by 1965 would have seemed foreclosed by Judge Youngdahl's decision in *Amalgamated Meat Cutters, supra,* and the Service's decision in *Matter of Bailey, supra* note 3. Congressmen familiar with the law, and aware that many thousands of Mexicans entered the country to find work, can be forgiven their failure to protest immediately what must have seemed only a minor and technical violation of the rules—the admission as commuters of those who would have been admissible without difficulty as special immigrants.

IV.

The Service argues finally that the mere existence of the commuter practice constitutes an administrative construction of the Immigration Act which we should honor. For the reasons already stated, it seems to me that the plain meaning of the Act and the intent of Congress are so clear as to foreclose judicial deference to an administrative agency. But I think it important to point out that we are not presented here with any consistent or coherent interpretation of the sort to which courts have traditionally deferred. *Cf. Norwegian Nitrogen Co. v. United States,* 288 U.S. 294, 315 (1933). Indeed, to the extent that the Service has in the past advanced any consistent interpretation of the Immigration Act, that interpretation has been directly in conflict with the Service's position in this case.

It is of course true that the Service has since 1952 continued to admit commuters to the United States without requiring entry visas. But the Service itself has admitted that the real basis of the practice is not statutory command but administrative fiat:

> "The commuter situation *manifestly does not fit into any precise category found in the immigration statutes.* The status is an artificial one, predicted upon good international relations maintained and cherished between friendly neighbors."

Matter of M—D—S—et al., 8. I. & N. Dec. 209, 213 (1958) (emphasis supplied).

Nor has the Service sought to legitimize this essentially lawless position by regulations describing and controlling the operations of the commuter system. Prior to 1952, of course, such regulations existed. But they were repealed upon passage of the Immigration Act and never again republished—eloquent testimony, in and of itself, to rebut the Service's current view that Congress in 1952 intended no change in the commuter practice.

Despite the absence of regulations, however, commuters continued to cross the border freely. The Service took the position that the 1952 Act had not disturbed "the practice of considering commuters as permanent residents," and relied on the "fiction of a commuter's permanent United States residence coinciding with his place of employment." *Matter of H— O—*, 5 I.&.N. Dec. 716, 718-19 & n.13 (1954).

This position was formalized in a regulation issued in 1957 which, with changes not material here, remained in force until 1966. It read as follows:

> § 211.1. Visas. A valid, unexpired immigrant visa shall be presented by each arriving immigrant alien except an immigrant who (a) was born subsequent to the issuance of an immigrant visa to his accompanying parent and applies for admission during the validity of such visa, or (b) *is returning to an unrelinquished lawful permanent residence* after a temporary absence abroad (1) not exceeding one year and present a Form I-151 alien registration receipt card duly issued to him, or (2) presents a valid unexpired re-entry permit duly issued to him, or (3) satisfies the district director in charge of the port of entry that there is good cause for the failure to present the required document, in which case an application for waiver shall be made on Form I-193."

22 Fed. Reg. 6377 (1957) (emphasis supplied).

The regulation is plainly inconsistent with the Service's present position. It clearly forbids the entry without a valid or re-entry permit of any immigrant not returning to an "unrelinquished lawful permanent residence" in the United States, and thus makes the privilege of using a Form I-151 to gain entry dependent upon actual residence in the United States. It is compatible with the commuter practice, which continued during the years 1957-66, only on the assumption, apparently made by the Service, that a commuter's place of employment constitutes an unrelinquished lawful permanent residence in the United States.

The same view of the Act was taken by the Service in the 1958 decision in *Matter of M— D— S—, et al., supra.* That was an appeal by the District Director

from a finding by the Special Inquiry Officer that certain alien commuters had been improperly excluded. The aliens had been issued immigrant visas, had used them to acquire Forms I-151, and had until a little more than six months previously been employed in the United States and admitted as commuters. When they sought to gain entry into the United States, they presented their still valid Forms I-151. The District Directors, however, excluded them on the grounds that they could not claim commuter status if they had had no United States employment for six months previously.

The Special Inquiry Officer, adopting essentially the position now urged by the Service, ruled that since the aliens had been lawfully admitted for permanent residence, they were entitled to use the Form I-151 as long as the latter was valid—at that time as now one year. But the Board of Immigration Appeals reversed, holding that by being unemployed for six months the commuters had abandoned [their] status of permanent resident[s]." 8 I. & N. Dec. at 213. Once again, therefore, the Service expressed its understanding that actual residence in the United States was essential to the commuter's status as an alien lawfully admitted for permanent residence, but that the commuter's place of employment was such a residence.

This view of the Act was also the Service's litigating position before Judge Youngdahl in the *Amalgamated Meat Cutters* case. *See* Memorandum in Support of Defendants' Motion to Dismiss at 10; *Note, Aliens in the Fields,* 21 Stan. L. Rev. 1750, 1755

(1969). But here the Service encountered a well-deserved rebuff. Judge Youngdahl pointed out that the Immigration Act itself defined "residence" as a person's "place of general abode . . . his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33). The language of the Act was obviously irreconcilable with any contention that a commuter's place of employment could constitute a residence. Judge Youngdahl therefore rejected the Service's position. 186 F.Supp. at 118-19.

Faced with this check, the Service was obliged "to re-examine the provisions of the 1952 Act, . . . and to adopt a new theory of the legal basis for the commuter practice." *Note, supra,* 21 Stan. L. Rev. at 1757. Hence, when the commuter practice once again came under attack in *Texas State AFL-CIO v. Kennedy,* 330 F.2d 217 (D.C.Cir. 1964), the Service was ready with the theory it now advances—that the commuter was not required to establish any residence in the United States, either fictitious or actual.

Yet even today, the Service's own regulations for the use of Form I-151 are not entirely consistent with the position it espouses in litigation. Unlike the version in force before 1966, the current text of 8 C.F.R. § 211.1(b) (1970) is not totally incompatible with the Service's commuter practice. But the caption to that section, which now includes an anti-strikebreaker clause that the Service concedes to be applicable to commuters, continues to refer to "aliens returning to an unrelinquished lawful permanent residence."

I would reverse the judgment below.

Appendix B

In the United States District Court
For the Northern District of California

No. 49,500

Joe Gooch and Rafael Bustamente, on behalf of themselves and a class of persons similarly situated but too numerous to mention,

Plaintiffs,

vs.

Ramsey Clark, Attorney General of the United States, Harlan B. Carter, Regional Commissioner, Immigration and Naturalization Service of the United States, and C. W. Fullilove, District Director, Immigration and Naturalization Service of the United States,

Defendants.

George Meany, President, and William F. Schnitzler, Secretary-Treasurer for and on behalf of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and for and on behalf of its affiliates and their members,

Plaintiffs in Intervention,

vs.

Ramsey Clark, Attorney General of the United States, Harlan B. Carter, Regional Commissioner, Immigration and Naturalization Service of the United States, and C. W. Fullilove, District Director, Immigration and Naturalization Service of the United States,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This is a class action for a writ of mandamus to compel the Attorney General and officials of the Immigration and Naturalization Service to exclude certain non-resident aliens. Jurisdiction is asserted under 5 U.S.C. §§ 702 and 703 and 28 U.S.C. § 1361.

Plaintiffs are domestic farm workers.[1] They claim to be injured by competition from the so-called "alien commuters". The latter are aliens who reside in an adjacent country and enter the United States periodically for purposes of employment, returning thereafter to their places of residence. While each commuter has been made eligible, by the appropriate United States authorities, to establish permanent residence in this country, none has exercised the privilege nor indicated an intention to do so. Based upon the continuing eligibility for permanent residence, each commuter has been allowed entry and reentry into the United States upon presentation of an alien registration receipt card, Form I-151 (the "green card"). This card shows the holder to have been lawfully admitted for permanent residence in the United States.

Plaintiffs claim this practice is contrary to the specific language of 8 U.S.C. §§ 1181(b) and 1182(a)(14), and 8 C.F.R. § 211.1(b)(1). They seek a writ

[1]Certain labor organizations have also been granted permission to intervene as plaintiffs to represent the interests of other domestic workers.

of mandamus requiring compliance with those sections as interpreted by plaintiffs. Defendants have moved for summary judgment. After extensive briefing by all parties, the case is ready for decision.

Defendants urge that plaintiffs lack standing to challenge the administrative practice here involved. They rely most heavily on *Texas State AFL-CIO v. Kennedy,* 330 F.2d 217 (D.C. Cir. 1964), in which union members challenging the same commuter practice were held to lack standing because "mere economic competition made possible by governmental action (even if allegedly illegal) does not give standing to sue in the courts to restrain such action. *Tennessee Electric Power Co. v. TVA,* 306 U.S. 118 (1939)." 330 F.2d at 219.

The *Texas State* decision may, at an earlier time, have been persuasive authority on the question in this case, but recent decisions of the Supreme Court run counter to its holding. The Supreme Court has expanded the availability of judicial review of administrative action, *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967), and has laid down guidelines on standing. *Flast v. Cohen,* 392 U.S. 83 (1968). Under *Flast,* plaintiffs here plainly have sufficient adverse and personal interest in the outcome of the litigation to assure that the issues will be properly presented in an adversary context.

Perhaps even more important, the Supreme Court has limited the doctrines of *Tennessee Electric Power Co. v. TVA* and the other cases relied on by the *Texas State* court. In *Hardin v. Kentucky Utilities Co.,* 390

U.S. 1 (1968), the Supreme Court distinguished that line of cases, saying: "when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision." 390 U.S. at 6. *See Jaffe, Standing to Secure Judicial Review: Private Actions,* 75 HARV. L. REV. 255, 266 (1961). In the present case, it is abundantly clear that one of the major purposes of the Immigration Act was to protect American labor against the influx of foreign labor. *Karnuth v. U.S.,* 279 U.S. 231, 243 (1929). The 1965 amendments to the Act reflect the same purpose. S.Rep. No. 748, 89th Cong., 1st Sess. (1965), *reprinted in 1965 U.S. Code Cong. & Admin. News,* 3328-29.

Under the doctrine of *Hardin,* this Court holds that plaintiffs have standing.

The remaining question is whether proper construction of the Act as amended requires exclusion of the "alien commuter" as a matter of law. Defendants frankly concede that no explicit statutory or constitutional provision protects the commuter against exclusion, *Cermeno-Cerna v. Farrell,* 291 F. Supp. 521, 529 (C.D. Cal. 1968).[2] Rather defendants rely upon the long practice of the Immigration and Naturalization Service in treating the commuter as a special immigrant defined in 8 U.S.C. § 1101(a)(27)(B) as "an immigrant, lawfully admitted for permanent

[2]For a brief summary of the history of the commuter practice since 1924, *see Amalgamated Meat Cutters & Butcher Workmen of North America AFL-CIO v. Rogers,* 186 F. Supp. 114, 117 (D.D.C. 1960).

residence, who is returning from a temporary visit abroad."[3] This interpretation by the Service persists and has been unvarying since passage of the Immigration and Nationality Act of 1952. *See* Deposition of Charles Gordon, General Counsel of the Immigration and Naturalization Service, pp. 9-12.

Such classification of the commuter as a special immigrant under § 1101(a)(27)(B) has two effects. It exempts the commuter from the certification requirements for aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor. 8 U.S.C. § 1182(a)(14).[4] It also allows

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[3] 8 U.S.C. § 1101(a)(27) provides in full:

(27) The term "special immigrant" means—

(A) an immigrant who was born in any independent foreign country of the Western Hemisphere or in the Canal Zone and the spouse and children of any such immigrant, if accompanying, or following to join him: *Provided,* That no immigrant visa shall be issued pursuant to this clause until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 1182(a)(14) of this title;

(B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad . . . .

[4] 8 U.S.C. § 1182(a)(14); and (a)(20) provide:

§ 1182.

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

• • •

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants

the Attorney General, in his discretion, to utilize the informal documentation provisions of 8 U.S.C. § 1181 (b),[5] and to grant the commuter entry upon presentation of his Form I-151 green card.

Plaintiffs challenge the Service's practice on the ground that it is precluded by the 1965 amendments to the Immigration Act. The challenge centers on the change in § 1181(b), which, prior to 1965, provided:

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defined in section 1101(a)(27)(A) of this title, (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in sections 1153(a) (3) and 1153(a) (6) of this title, and to non-preference immigrant aliens described in section 1153(a) (6) of this title;

• • •

(20) Except as otherwise specifically provided in this chapter, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(a) of this title . . . .

[5] 8 U.S.C. § 1181 provides:

§ 1181.

(a) Except as provided in subsection (b) of this section no immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa or was born subsequent to the issuance of such visa of the accompanying parent, and (2) presents a valid unexpired passport or other suitable travel document or document of identity and nationality, if such document is required under the regulations issued by the Attorney General. . . .

(b) Notwithstanding the provisions of section 1182(a) (20) of this title in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, returning resident immigrants, defined in section 1101(a)(27)(B) of this title, who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation.

> Notwithstanding the provisions of section 1182 (a)(20) of this title, . . . *otherwise admissible aliens lawfully admitted for permanent residence who depart from the United States temporarily* may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation. (Emphasis added; for text of § 1182(a)(20), see footnote 4.)

This section was amended in 1965 to read:

> Notwithstanding the provisions of section 1182 (a)(20) of this title . . . , *returning resident immigrants, defined in section 1101(a)(27)(B) of this title, who are otherwise admissible* may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation. (Emphasis added.)

Plaintiffs urge that the change in wording of the emphasized portions now requires exclusion of the commuter who is not a permanent resident of the United States returning from a temporary visit abroad.

While the amendment is susceptible to that interpretation, it is also susceptible to an interpretation that, by its specific reference to § 1101(a)(27)(B), it tacitly approves the long-standing practice of the Immigration and Naturalization Service. Moreover, Congress had made no changes in the definition of "immigrant" under § 1101(a)(27)(B), and nothing

in the legislative history of the 1965 amendments indicates that Congress in any way intended to change or prohibit the commuters' right of entry. In fact, the final Senate Report and Conference Report on the 1965 amendments do not mention the change in § 1181(b) nor its purpose, even in the portion giving a section-by-section analysis of the amendments. *See* S.Rep. No. 748, 89th Cong., 1st Sess. (1965), *reprinted in 1965 U.S. Code Cong. & Admin. News,* 3328, 3342.

For many years, Congress has been aware of the commuter practice and of the administrative decisions upholding it. There have been Congressional hearings, *see, e.g., Study of Population and Immigration Problems, Special Series No. 11, Before the Subcommittee No. 1 of the House Comm. on the Judiciary,* 88th Cong., 1st Sess. (1963). None of the hearings has resulted in any report adverse to the practice nor in any recommendation to abolish it. This Congressional inaction has special significance in the light of the consistent administrative decisions and the refusal in 1964 by the Court of Appeals for the District of Columbia, in *Texas State,* to declare the practice unlawful.

If Congress wishes to end that practice, it has the power to do so. The issue here is not as to the power of Congress; it is, rather, as to the interpretation to be given an exercise of that power in the 1965 amendments under consideration.

In the light of the long history of the commuter practice, the unvarying administrative interpretation allowing commuter entry, and the potential foreign

policy consequences involved in termination,[6] it is hardly reasonable to assume that Congress intended to make such a radical change by an obscure amendment to § 1181(b), not even referred to in any legislative history.

The Court should not attribute to Congress any such casual and off-handed disposition of so important a matter—especially when the language of Congressional amendment can be interpreted consistently with continuation of a long-standing practice of which Congress had full knowledge.

Defendants' motion for summary judgment is granted. Let judgment be entered accordingly.

Dated: June 19, 1969.

STANLEY A. WEIGEL
Judge

Filed June 24, 1969,
Clerk U.S. Dist. Court,
San Francisco.

[6] *See* Affidavit of Dean Rusk, Secretary of State, indicating, *inter alia*, that the practice contributes to friendly relations with Canada and Mexico, that termination would be deleterious to those relations and that economic advantages result from the practice.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1414

JOE GOOCH AND RAFAEL BUSTAMENTE, PETITIONERS

v.

JOHN N. MITCHELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 433 F. 2d 74. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1970, and a petition for rehearing with suggestion for rehearing en banc was denied on December 1, 1970. The petition for a writ of certiorari was filed on March 1, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

423-479—71

QUESTION PRESENTED

Whether petitioners are entitled to a writ of mandamus requiring the Attorney General to abandon the longstanding practice of treating aliens possessing permanent resident visas, who commute from their homes in Canada or Mexico to places of employment in the United States, as duly admitted immigrants returning from temporary visits abroad.

STATEMENT

Petitioners filed this class action in the United States District Court for the Northern District of California pursuant to 28 U.S.C. 1361 on behalf of resident farm workers employed in southern California. The action sought mandamus directing the Attorney General to deny admission to alien "commuters"—aliens previously authorized for permanent residence in the United States who maintain homes in Canada or Mexico from which they commute daily or seasonally into this country to work. Two officers of the AFL–CIO intervened on behalf of that organization and its affiliates in support of the petition. The district court held that petitioners had standing to bring the action and granted summary judgment against them on the merits (Pet. App. B). The court of appeals affirmed, unanimously on the question of standing and with one judge dissenting on the merits (Pet. App. A).

The alien commuter practice that petitioners challenge has been utilized for over forty years, and presently involves some 30,000 to 40,000 persons who cross from residences in Mexico and Canada to their

jobs in the United States. Each commuter has previously been admitted into the United States for permanent residence under the provisions of the Immigration and Nationality Act of 1952 (8 U.S.C. 1101 et seq.), but has not actually taken up permanent residence here or indicated an intention to do so. (Pet. App. A, p. xi; Pet. App. B., p. xxxii.)

Based upon their continuing eligibility for permanent residence, the Immigration and Naturalization Service has considered such alien commuters as resident immigrants within the class defined in Section 1101(a)(27)(B): "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad." This classification allows the Attorney General to admit the commuters, when they come here to work, pursuant to the informal documentation provisions of Section 1181(b), and it exempts them on reentry from the labor certification provisions of Section 1182(a)(14). Thus, the Attorney General has issued each commuter an alien registration receipt card (like that given resident aliens), upon presentation of which, and without more, commuters are allowed entry and reentry into the United States. This practice, although not expressly sanctioned by statutory language, has been continuously followed since the first restrictive legislation in this area, the Immigration Act of 1924. (Pet. App. A, p. iii; Pet. App. B, p. xxxii.)

Petitioners argued in the courts below, as they do here, that commuters are not within Section 1101(a)(27)(B) and thus are not eligible for the informal documentation privileges of Section 1181(b). In support of their argument petitioners cite a 1965 amend-

ment to Section 1181(b). Prior to the amendment the benefits of that section were available to "otherwise admissible aliens lawfully admitted for permanent residence *who depart from the United States temporarily*" (emphasis supplied). The amended version refers instead to "returning resident immigrants, defined in section 1101(a)(27)(B) of this title, who are otherwise admissible," incorporating the Section 1101(a)(27)(B) definition of a returning resident immigrant as one who is "lawfully admitted for permanent residence [and] who is *returning from a temporary visit abroad*" (emphasis supplied). According to petitioners (Pet. 7), "the clear meaning of the new language was to exclude the nonresident commuter" from the informal documentation privileges of Section 1181(b) and the exemption from the labor certification requirements of Section 1182(a)(14).

The government responded by detailing the long-standing and uninterrupted administrative practice under which commuters were and are considered resident immigrants within Section 1101(a)(27)(B), and have been accorded the benefits that follow from that classification. In the government's view, Congress—well aware of this classification [1]—has not modified or disapproved it despite numerous reconsiderations of the

[1] See, *e.g.*, S. Rep. No. 1515, 81st Cong., 2d Sess. 535–536, 616; H. Rep. No. 1365, 82nd Cong., 2d Sess. While Congress has continued to devote considerable attention to this area and specific legislation has been proposed (see, *e.g.*, S. 3545, 91st Cong., 2d Sess.; S. 1694, 91st Cong., 1st Sess.; H. R. 9505, 91st Cong., 1st Sess.), no such legislation has yet been enacted. The matter is still before Congress, as similar legislative proposals have been introduced this year. See S. 1373, 92nd Cong., 1st Sess.; S. 1488, 92nd Cong., 1st Sess.

general statutory pattern. Thus, the government argued and the courts below held, the 1965 amendment did not affect commuters adversely, since they remain within the "resident" category of the statute as amended.

The district court granted summary judgment for the government. It held that the 1965 amendment to Section 1181(b) "tacitly approves the longstanding [administrative] practice" under which commuters are considered to be resident immigrants within Section 1101(a)(27)(B), since the amendment specifically refers to the latter provision without changing its definition "and nothing in the legislative history of the 1965 amendments indicates that Congress in any way intended to change or prohibit the commuters' right of entry" (Pet. App. B, pp. xxxvi, xxxviii). In a detailed opinion, a divided court of appeals affirmed (Pet. App. A).

ARGUMENT

The decision below is correct, and there is no conflict of circuits or other reason for review by this Court.

1. As noted above, this decision is in complete accord with the unbroken administrative interpretation and application of Section 1101(a)(27)(B). The 1965 amendment to Section 1181(b), on which petitioners so heavily rely, did not alter the provisions of Section 1101(a)(27)(B), nor does the legislative history of that amendment show any Congressional disapproval of the well-known administrative practice with respect to commuters. As the court of appeals properly held, Congress simply did not address itself

to any problems associated with the commuter practice. In these circumstances, petitioners incorrectly argue that the statute forbids the established procedures whereby the Attorney General long has regulated commuter entries to this country.

2. We recognize that the District Court for the District of Columbia decided (*Amalgamated Meat Cutters & Butcher Work.* v. *Rogers*, 186 F. Supp. 114) that commuters are not within the Section 1101(a)(27)(B) definition of resident immigrants insofar as that section is incorporated by reference in Section 1182(a)(14), and that this decision perhaps conflicts, at least in principle, with the decision here.[2] But that decision was disapproved by the Court of Appeals for the District of Columbia Circuit (see *Texas State AFL–CIO* v. *Kennedy*, 330 F. 2d 217), just as it was by the Ninth Circuit in the present case (see Pet. App. A, p. xiii-xiv)[3]. In view of this there is no need for resolution by this Court.

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[2] In our view *Amalgamated Meat Cutters* was wrongly decided. As noted here by the court of appeals, that case became moot and accordingly no appeal was taken (see Pet. App. A, p. xiv). The Immigration and Naturalization Service has narrowly limited the decision to its specific holding and has rejected arguments that it undermines the validity of the general commuter practice under Section 1101(a)(27)(B).

[3] *Amalgamated Meat Cutters* was decided in 1960, long before the 1965 amendment to Section 1181(b) on which petitioners rely. During deliberations on the proposed legislation, the Service made clear to Congress that it disagreed with this decision and would not follow it. Congress nevertheless did not specifically legislate on the commuter practice and thereby, we think, tacitly approved it once more. These facts substantially undercut petitioners' assertion, discussed earlier, that Congress intended by the Section 1181(b) amendment to change the law as to commuters.

3. Moreover, petitioners' statement (see Pet. 13–17) of the hardships which the commuter practice entails for United States working men presents an incomplete view. Prior to the restrictive legislation of 1924, persons from Canada and Mexico could freely cross to their jobs in the United States; no formal entry procedures were required. The commuter practice arose in response to the recognized need to continue free access to this country by these persons, and was "predicated upon good international relations maintained and cherished between friendly neighbors." *Matter of M—D—S— & L—G— & W—D—C,* 8 I. & N. Dec. 209, 213.[4] This practice has now continued for over forty years, and presently involves some 30,000 to 40,000 workers residing in Canada and Mexico. Quite obviously, these workers and their governments have a vital interest in protecting their livelihood, which may appropriately be balanced against petitioners' assertion of hardship. As noted, Congress to date has tacitly approved the commuter practice as consistent with Section 1101(a)(27)(B). In these circumstances, we submit, petitioners' remedy, if any, must come from Congress, to which their problems have been, and even now are being, presented (see note 1, *supra*).

[4] The Secretary of State submitted below an affidavit asserting his view that the exclusion of such commuters would have adverse foreign policy effects. See Pet. App. B, p. xxxix note 6.

CONCLUSION

For the foregoing reasons its is respectfully submitted that the petition for a writ of certiorari should be denied.

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